STATE OF MICHIGAN

COURT OF APPEALS

BARRETT ELLIS PROPERTIES, L.L.C., Plaintiff-Appellant,	UNPUBLISHED May 7, 2009
v	No. 282672 Wayne Circuit Court
CITY OF ECORSE and LARRY SALISBURY, Defendants-Appellees.	LC No. 05-519784-CC

Before: Zahra, P.J., and O'Connell and K. F. Kelly, JJ.

PER CURIAM.

Plaintiff Barrett Ellis Properties, LLC, appeals as of right from the trial court's order granting summary disposition in favor of defendant City of Ecorse (the city). Plaintiff argues on appeal that the trial court erred in granting summary disposition because the city's actions constitute an unconstitutional taking of property for which plaintiff is entitled to compensation. We agree that summary disposition was not proper and reverse. Plaintiff also argues that the trial court erred in granting summary disposition in favor of defendant Larry Salisbury, mayor of the city, on the ground that he is entitled to governmental immunity. We disagree and affirm the grant of summary disposition as to defendant Salisbury.

First, plaintiff argues that the trial court erred in granting summary disposition because there exists a genuine issue of material fact regarding whether defendants' conduct constituted inverse condemnation. We review de novo the trial court's ruling on a motion for summary disposition. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). A motion brought under MCR 2.116(C)(10) tests whether there is an issue of fact for trial. "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Both the United States and Michigan constitutions prohibit the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). An inverse condemnation, which plaintiff claims occurred in this case, occurs when the a government entity "effectively takes

private property without a formal condemnation proceeding," *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 125; 680 NW2d 485 (2004) (de facto taking), or when the government overburdens the property with regulations, *K & K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998). In this case, plaintiff contends that defendants' actions constitute a regulatory taking.

A regulatory taking occurs in two situations: "(1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of [the] land." *Id.* A regulation can deny an owner economically viable use of the land in two circumstances:

> (a) a "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land," *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking recognized on the basis of the application of the traditional "balancing test" established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). [*Id.* at 576-577.]

The *K & K* Court explained the proper method of reviewing whether a taking occurred under each circumstance:

> In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. *Lucas*, *supra* at 1015. A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or where a regulation forces an owner to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good . . . ." *Id.* at 1019 (emphasis in original). In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquir[y]," centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *Penn Central*, 438 US at 124. [*Id.* at 577.]

Finally, a taking need not be permanent to be actionable. "[T]emporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church of Glendale v Co of Los Angeles*, 482 US 304, 318; 107 S Ct 2378; 96 L Ed 2d 250 (1987) (internal quotations omitted); see also *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 69-71; 445 NW2d 61 (1989) (distinguishing and explaining *First English*).

This dispute concerns a house that plaintiff owned in the city. When plaintiff purchased the property, it was inhabited by four tenants but zoned for single-family use. Plaintiff argues that defendants first prevented it from repairing the property to its original legal nonconforming use as a multi-family residence, then prevented plaintiff from renovating the property to a single-family use, and finally told plaintiff that it could not demolish the property and rebuild a single-family residence because the lot was "irregular." On April 6, 2007, the trial court ordered the

city to permit plaintiff to renovate the property to a single-family residence. Plaintiff argues that before this order, the city's repeated obstacles constituted a categorical regulatory taking.

Defendants argue that plaintiff could have always obtained a permit to renovate the property, *as reflected by* the trial court's April 6, 2007, order. On the contrary, the city's building superintendent testified that he posted notices on the house indicating that it could not be renovated or rebuilt. Further, defendants admitted in its trial court filings that the city's position was that the building could not be renovated or rebuilt and must be torn down. Thus, the trial court erred in concluding that there was no genuine issue of material fact regarding whether there was a *temporary* constitutional taking before April 6, 2007. As we note, *infra*, there remain outstanding questions of fact, which the trial court did not resolve, regarding when the zoning regulation for this property took effect and whether plaintiff ever abandoned its nonconforming use.

Next, plaintiff argues that the trial court erred in granting summary disposition in favor of the city because the ordinances that it applied against plaintiff in this case were unconstitutional. Plaintiff also argues that the requirement in the city zoning ordinance that the cost of repairs on a nonconforming use not exceed one-half of the state equalized value (SEV) of the property is also unconstitutional because a property owner has a right to repair a nonconforming use. Because the trial court did not reach these questions, they are unpreserved on appeal and we decline to review them. *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007).

Additionally, plaintiff argues that a genuine issue of material fact remains concerning the cost of the proposed repairs and whether this constitutes 50 percent of the property's SEV. The only evidence that the cost of repairs to the property would have exceeded 50 percent of the property's SEV is the testimony of city's building superintendent. However, he also testified that this was an "off-the-cuff" estimate, that he did not know the SEV of the property, and that he had never been inside the house. Thus, there remains a genuine issue of material fact regarding the cost of repairs to the property and summary disposition would not have been proper on this issue.[1]

Plaintiff also argues that the trial court erred in not granting an injunction in its favor requiring the city to permit it to repair the property as a multi-family residence. Plaintiff's underlying argument simply rehashes its earlier argument that a temporary constitutional taking occurred in the time period before the trial court issued its April 6, 2007, order. As noted above, there are multiple questions of fact that the trial court declined to resolve. Because we have already concluded as a matter of law that the events alleged by plaintiff may have constituted a temporary inverse condemnation, we are not in a position to resolve these factual questions.

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[1] Plaintiff also challenges the underlying factual questions of abandonment and the cost of repairs separately on appeal. These issues were not addressed by the trial court and therefore are unpreserved. Thus, we need not address them beyond noting, as we have already, that there is conflicting evidence regarding each of these issues, which the trial court must resolve. *Heydon*, *supra* at 278.

Plaintiff finally argues that the trial court erred in granting summary disposition in favor of Salisbury because he is entitled to governmental immunity. Salisbury was the city mayor during the events underlying this case and lives adjacent to the property in question. Plaintiff argues that this makes it clear that Salisbury acted in concert with other city officials to deprive plaintiff of its constitutional rights, in violation of 42 USC 1983.

We review de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7). *Regan v Washtenaw Rd Comm'rs*, 249 Mich App 153, 157; 641 NW2d 285 (2002).

> Summary disposition is proper when a claim is barred because of immunity granted by law. To survive a motion for summary disposition based on governmental immunity, the plaintiff must allege facts giving rise to an exception to governmental immunity. This Court considers all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them. [*Id.* (internal citations omitted).]

In order to survive a motion for summary disposition on the ground of governmental immunity, the plaintiff must demonstrate an exception to the rule that a government official is entitled to immunity when engaged in the exercise of a governmental function. See MCL 691.1407(1); *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 111; 729 NW2d 883 (2006).

Plaintiff's argument is founded on circumstantial evidence and an affidavit of Robert Smith, plaintiff's agent. Plaintiff points to two prior lawsuits initiated by Salisbury against two separate defendants, as well as against the city building department. Plaintiff presented evidence that Salisbury has engaged in a prior frivolous property dispute with another neighbor. Smith stated in his affidavit that he was "informed that [Salisbury], a neighbor of the property, would have to approve any disposition of [citations left on the property]." As the trial court noted, Smith's statement is of limited use because it is a bare allegation, without reference to any evidentiary support. Smith does not say who told him that Salisbury would have a role in resolving his citations. There was no evidence presented that Salisbury had anything to do with the building department's on-going conflicts with plaintiff.

Plaintiff's argument suffers from multiple deficiencies. First, plaintiff has not proffered an exception to governmental immunity applicable to this case. *Linton*, *supra* at 111. Second, plaintiff has not actually identified any specific conduct by Salisbury that is in any way related to plaintiff's alleged deprivation of rights by the city. *Mettler Walloon*, *supra* at 218. The evidence that plaintiff has presented merely identifies a possible motive and opportunity for nefarious conduct by Salisbury; plaintiff is left to only speculate regarding Salisbury's actual involvement in the events underlying this case. *Id.* at 219. Moreover, plaintiff does not even clearly allege that any unspecified conduct by Salisbury was anything other than a proper exercise of his governmental function. *Linton*, *supra* at 111. Thus, we conclude that plaintiff has not overcome the presumption of governmental immunity for actions by a governmental actor, and the trial court did not err in granting defendants' motion for summary disposition in favor of Salisbury.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly